

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

**ROBERT MOORE,
Plaintiff,
v.
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT; U.S. CUSTOMS AND
BORDER PROTECTION; AND
U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
Defendants.**

EP-19-CV-00279-DCG

PARTIES' SECOND AMENDED LOCAL RULE 16(e) PRE-TRIAL FILINGS

TO THE HONORABLE DAVID C. GUADERRAMA, U.S. DISTRICT JUDGE:

COMES NOW Plaintiff, Robert Moore, and Defendant, U.S. Customs and Border Protection (CBP), in the in the above-entitled and captioned cause and pursuant to Local Rule CV-16(e)(4), submits their Amended Pre-Trial Filings as follows:

JOINT EXHIBIT LIST

| EXHIBIT NO. | DESCRIPTION | OFFERED | ADMITTED | NOT ADMITTED |
|-------------|---|---------|----------|--------------|
| J-1 | CBP acknowledgement receipt of Plaintiff's FOIA request CBP-2018-064544, June 19, 2018 (Pl. Complaint, Ex. 1) | | | |
| J-2 | Pl. request for update to CBP Public Affairs Officer (PAO), August 25, 2018 (Pl. Complaint, Ex. 2) | | | |
| J-3 | PAO's response to Pl., August 26, 2018 (Pl. Complaint, Ex. 3) | | | |
| J-4 | CBP granting fee waiver to Pl., March 27, 2019 (Pl. Complaint, Ex. 4) | | | |
| J-5 | CBP response letter and documents for CBP-2018-064544, June 15, 2021 | | | |
| J-6 | CBP response letter and documents for CBP-2018-064544, June 21, 2021 | | | |
| J-7 | CBP Vaughn Index for CBP-2018-064544, June 21, 2021 | | | |
| J-8 | Chart of Redactions in Dispute, Sept. 1, 2021 | | | |

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| J-9 | Chart of Redactions in Dispute, Sept. 10, 2021 | | | |
| J-10 | Production of documents, Sept. 10, 2021 | | | |

PLAINTIFF EXHIBIT LIST

| EXHIBIT No. | DESCRIPTION | OFFERED | ADMITTED | NOT ADMITTED |
|----------------|---|---------|----------|-----------------|
| P-1 | Emails from Robert Moore to CBP agents | | | |
| P-2 | FOIA request from Americans for Immigrant Justice, July 3, 2013 and Response | | | |
| P-3 | Dep't of Homeland Security Organizational Chart | | | |
| P-4 | Dep't of Homeland Security – Office of Inspector General, <i>Management Alert</i> (May 30, 2019) | | | |
| P-5 | Dep't of Homeland Security – Office of Inspector General, <i>CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry</i> , OIG-21-02 (Oct. 27, 2020) | | | |

Both parties reserve the right to submit additional exhibits for purposes of rebuttal or impeachment, should the need arise.

PARTIES STATEMENT OF THE CASE

Between June 2018 and March 2019, Plaintiff submitted five requests for information under the Freedom of Information Act (FOIA) to three federal agencies. The issue for the instant bench trial relates to Plaintiff's June 2018 request to CBP (FOIA Request Number CBP-2018-064544). In Plaintiff's request, he sought "any and all directives, emails, text messages and other communications from CBP officials regarding the handling of potential asylum seekers at ports of entry when port facilities are at 'capacity.' The period covered by this request is Jan. 1, 2018 to June 16, 2018." CBP completed its production to Plaintiff of responsive records for this request on June 21, 2021.

In CBP's production of responsive records to Plaintiff, CBP claimed FOIA exemptions under 5 U.S.C § 552(b)(7)(E) in redacted portions of its production. FOIA exemption (b)(7)(E) permits withhold of records or information compiled for law enforcement purposes, but only to the extent that production of such records or information would disclose techniques and procedures for law enforcement investigation or prosecution, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. *Id.* At issue here is whether CBP has properly asserted exemption (b)(7)(E) in withholding migrant information from its June 15, 2021 and June 21, 2021 production. At the time of the Amended Rule 16(e) filing on September 1, 2021, the specific redactions were excerpted from the Production provided to the Court as Exhibit J-32. As of the day of trial, the Parties have made further agreements and CBP has rolled back further redactions. The only redactions left for the Court's consideration are presented to the Court in Exhibit J-9.

For the reasons laid out in their separate Proposed Findings of Fact and Conclusions of Law, the parties dispute whether exemption (b)(7)(E) applies to these items.

DEFENDANT'S WITNESS LIST

Since Defendant carries the burden of proof to establish the application of exemptions, their witnesses are listed first. The Parties both have witnesses who can only present testimony if they can do so via zoom. The Parties respectfully request the Court to permit testimony via zoom for witnesses who are not in El Paso, Texas.

Defendant's Witnesses Expected to Testify

1. Patrick Howard, Branch Chief, FOIA Division, Privacy and Diversity Office, Office of the Commissioner, CBP (via zoom if permitted);
2. Samuel Cleaves, Assistant Port Director, Port of El Paso, CBP.

Plaintiff's Witnesses Who May Testify

1. Robert Moore, Plaintiff;

2. Emily Creighton, American Immigrant Council, 1331 G St. NW Suite 200 Washington, D.C. 20005-3141 (via zoom if permitted).

Plaintiff reserves the right to call witnesses to testify depending on the presentation of Defendant's witnesses.

ESTIMATED TIME OF TRIAL

The parties expect the trial to last no longer than four hours.

A LIST OF STIPULATED FACTS

1. This Court has jurisdiction over Freedom of Information Act (FOIA) matters pursuant to 5 U.S.C. §552(a)(4)(B).
2. Venue is proper for this matter in the Western District of Texas, El Paso Division.
3. Plaintiff, Robert Moore is a journalist who resides in El Paso County, Texas.
4. On June 16, 2018, Plaintiff submitted a FOIA request to U.S Customs and Border Protection (CBP) seeking "any and all directives, emails, text messages and other communications from CBP officials regarding the handling of potential asylum seekers at ports of entry when port facilities are at 'capacity.' The period covered by this request is Jan. 1, 2018 to June 16, 2018."
5. On June 19, 2018, Plaintiff received an automated response from CBP confirming receipt of FOIA request number CBP-2018-064544.
6. On March 27, 2019, CBP advised Plaintiff that a fee waiver for his FOIA request was granted.
7. On October 1, 2019, Plaintiff filed this FOIA lawsuit against CBP.
8. As of Plaintiff filing the instant lawsuit on October 1, 2019, CBP had not produced any responsive records to FOIA request CBP-2018-064544.
9. On May 28, 2021, CBP made its initial release of responsive records to Plaintiff's FOIA request CBP-2018-064544.
10. CBP made its releases of responsive records on June 4, 2021.
11. CBP made its third production of responsive records on June 15, 2021.
12. On June 21, 2021, CBP reproduced some records from its first production with some redactions rolled back. CBP also produced a responsive video and Vaughn index for Plaintiff's FOIA request CBP-2018-064544.

Respectfully submitted,

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